United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 13, 2004

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United Food and Commercial Workers
Union, Local 120 (Wal-Mart Stores) 536-2507
Case 32-CB-5757-1

This Section 8(b)(1)(A) case was submitted for advice as to whether the Union violated the Act by filing a class action lawsuit against the Employer for alleged violations of California's wage laws. The basis for the charge is the Employer's novel theory that the lawsuit was filed and maintained with the illegal object of coercing the Employer's unrepresented California employees to engage in concerted activity by forcing them to be members of the alleged plaintiff class without notice or opportunity to opt out of the proceeding and/or imposing unwanted Union representation upon them.

We conclude that the lawsuit does not violate Section 8(b)(1)(A) and the charge should be dismissed absent withdrawal. There is no basis for finding that the suit had an illegal object. First, the theory that individual employees have been coerced to be members of the plaintiff class and, hence, illegally compelled to participate in concerted activity is without merit since the case has not yet been certified as a class action and the court may yet afford potential employee-plaintiffs the opportunity to opt out, making it speculative that any employee would be forced to be a plaintiff. Second, there is no merit to the claim that the Union initiated the lawsuit with the illegal object of forcing itself as a collective bargaining representative upon the employees, since its representation of Wal-Mart employees to vindicate their rights under California law, pursuant to a valid rule of civil procedure providing class action status, is not the equivalent of forcing representation for collective-bargaining purposes under Section 9(a). Third, the mere fact that employees may obtain benefits as plaintiffs if the Employer's alleged violations of state law are sustained does not mean that such benefits rise to the level of illegal coercion under the Act. Finally, dismissal is appropriate under Bill

Johnson's/BE & K[1] because there is no evidence of retaliatory motive.

FACTS

The Employer employs more than 50,000 non-supervisory employees in its approximately 155 discount stores in California. The United Food and Commercial Workers Union and several of its local unions have at various times attempted to organize these employees, but their efforts have been unsuccessful, to date.

On October 30, 2003, UFCW Local 120, together with its sister union, UFCW Local 1036[2] and a former Wal-Mart employee, filed a multi-count lawsuit in the Alameda County Superior Court alleging that the Employer violated various provisions of California's Labor and Business and Professions codes.[3] The lawsuit was thereafter removed to the United States District Court for the Northern District of California.[4] The Union filed an amended complaint on March 22, 2004, deleting Local 1036 as a plaintiff and adding four individual plaintiffs who are also former employees of California Wal-Mart stores.

As amended, Counts I through VII of the lawsuit allege violations of various California Labor Code provisions and regulations.[5] Count VIII alleges that the violations

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[1] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983); BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[2] The two locals will be referred to as "the Union."

[3] United Food and Commercial Workers Union Local 120, et al. v. Wal-Mart Stores, Inc., Case No. RG03124739, filed October 30, 2003 (Cal. Super. Ct.).

[4] United Food and Commercial Workers Union Local 120, et al. v. Wal-Mart Stores, Inc., Case No. C 03-05278 SI (N.D. Cal.).

[5] Count I alleges the unlawful withholding of workers compensation costs from employee wages under California Labor Code § 3751. Count II alleges the unlawful deduction of the costs of Employer-required medical examinations and tests from employee profit sharing payments under California Labor Code § 222.5. Counts III and IV allege the unlawful deduction from employee wages of ordinary Employer business losses regardless of employee fault in violation of California labor regulations and California Labor Code §§ 221-223, 400-410 and 3751(a). Count V alleges the imposition of unlawful waiting periods for the payment of

alleged in the prior counts constitute unlawful, unfair and fraudulent business practices under California Business and Professions Code § 17200. The lawsuit seeks actual and compensatory damages, declaratory relief, including an accounting of monies owed, and preliminary and permanent injunctive relief restraining future violations.

The amended complaint also pleads that the plaintiffs are bringing the case as a class action "pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) and/or (b)(3)" on behalf of themselves and all others similarly situated belonging to a plaintiff class consisting of "[a]ll persons who are employed or who have been employed in one or more of Wal-Mart's stores in California, at any time since October 30, 1999, and who have been subject to the unlawful wage deductions alleged in this complaint."

On April 14, Local 120, with court approval, withdrew from the case. The lawsuit is pending before the court, but there has been no hearing on either the class certification issue or the merits.

ACTION

We conclude that the charge should be dismissed absent withdrawal. The novel contention that the otherwise legitimate lawsuit has the unlawful objective of coercing employees in their statutory right to refrain from engaging in concerted activity and/or illegally imposing Union representation upon them is without merit, and, in the absence of evidence that the lawsuit was filed with a retaliatory motive, there is no basis for enjoining the lawsuit as an unfair labor practice at this time or at the conclusion of the litigation.

1. The Union's lawsuit lacks an unlawful object.

In footnote 5 of Bill Johnson's,[6] the Court held that the Board may enjoin lawsuits filed with an objective that

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compensation and wages owed to employees upon discharge or resignation under California Labor Code §§ 201-203. Count VI alleges the failure to regularly pay employees their entire earned wages and benefits without reduction for Employer costs or expenses under California Labor Code § 204. Count VII alleges the failure to provide employees with accurate itemized statements of their actual, lawful wages, benefits and deductions as required by California Labor Code § 226(a).

[6] Bill Johnson's, 461 U.S. at 737 n.5.

is illegal under the Act. The gravamen of the Employer's charge is that the Union's lawsuit has the unlawful object of forcing Wal-Mart's unrepresented employees to participate in concerted activity. The Employer argues that because the Board has found class action lawsuits to be protected concerted activity,[7] and because the Union filed the suit as a class action that may not provide an opportunity for employee/class members to opt out of the proceedings, the employees are being denied their Section 7 right to refrain from engaging in the concerted lawsuit activity.

A federal court may certify a case as a class action and permit one or more members of an affected class to sue on behalf of the entire class provided the would-be representatives meet four prerequisites: numerosity, commonality, typicality, and adequacy of representation,[8] and the parties seeking class certification must show the suit is maintainable under at least one of the subdivisions of Rule 23(b).[9] The plaintiffs here assert that they satisfy the requirements of Rule 23(a) and are proper representatives of the class and that the case is amenable to class litigation under either subdivision (b)(2) or (b)(3) of the rule, or both. The main difference between these two provisions is that if an action proceeds under Rule 23(b)(2), no notice will be given to members of the plaintiff class, and none will be allowed to opt out of the litigation.[10] In contrast, Rule 23(b)(3) requires that "each member of the plaintiff class must receive notice and an opportunity to opt out and litigate (or not) on his own

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[7] See Novotel New York, 321 NLRB 624, 629-634 (1996) (unions' efforts to judicially vindicate employee wage claims are protected concerted activity).

[8] Fed. R. Civ. P. 23(a) ("[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class").

[9] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997); Fed. R. Civ. P. 23(b)(1)-(3).

[10] See Coleman v. General Motors Acceptance Corp., 296 F.3d 443, 447 (6th Cir. 2002) (procedural protections of notice and opportunity to opt out of the class action are unnecessary in a Rule 23(b)(2) class action because "its requirements are designed to permit only classes with homogenous interests").

behalf."[11] Moreover, the courts may exercise plenary authority under Rule 23(d)(2) and Rule 23(d)(5) to provide all class members with personal notice and an opportunity to opt out.[12]

To the extent the Employer's "illegal object" theory relies upon the possibility that individual employees may not be notified of the litigation or afforded the opportunity to opt out of the plaintiff class, that outcome is, at present, speculative, since the court has yet to certify the case as a class action or make any determination regarding notification or opt out rights of potential plaintiffs under the principles discussed above. And, in any event, the Employer still will have the opportunity to argue against class certification or for notification and opt-out provisions at the hearing. Moreover, even if the court certifies the class under Rule 23(b)(2), and provides for no notice or opt-out opportunities for employees as class members, we would not enjoin as an unlawful object the Union's attempt to invoke class certification under a legitimate, judicially recognized rule of civil procedure. Indeed, the Supreme Court has repeatedly reminded the Board that it cannot ignore the broader policies of our nation's laws.[13]

The Employer also contends that even if the court's Rule 23 decision allowed them to opt out, employees would still be compelled to participate in the litigation as unknowing, absent plaintiffs by virtue of the unfair business practice allegations of Count VIII. This argument

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[11] Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 896 (7th Cir. 1999).

[12] See Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997) (Rule 23(d)(5) is "broad enough to permit the court to allow individual class members to opt out of a (b)(1) or (b)(2) class when necessary to facilitate the fair and efficient conduct of the litigation").

[13] See Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942) (Board may not effectuate policies of NLRA so single-mindedly that it may ignore other equally important congressional objectives, but must accommodate its statutory scheme to that of other federal laws); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147, 149 (2002) (awarding backpay to illegal aliens counter to policies underlying IRCA and therefore beyond the Board's remedial discretion; "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield").

is also without merit. Section 17200 of the state Unfair Competition Law permits "any person, corporation, or association acting for its own interests, interests of its members or those of the general public" to bring an action as a private plaintiff to obtain redress for a wide range of unlawful business practices.[14] The Employer emphasizes this allegation because § 17200 procedures do not specifically require notice to victims of the alleged unlawful practice. Again, the Employer argues that this provision will lead to coercion of employees' right to refrain from engaging in the lawsuit since, without notice of the proceeding, they will be compelled to stay in the litigation. However, although § 17200 procedures do not specifically require notice to victims of the alleged unlawful practice, in representative actions, "the trial court *may* order the defendant to notify the absent persons on whose behalf the action is prosecuted of their right to make a claim for restitution, establish a reasonable time within which such claims must be made to the defendant, and retain jurisdiction to adjudicate any disputes over entitlement to and the amount of restitution to be paid."[15] Thus, since § 17200 does permit the Employer, as a defendant, to protect its interests by notifying absent victims themselves, the Employer's argument based on the risk of compulsory participation in the lawsuit is also speculative at best. Accordingly, the fact that the Union, suing as a § 17200 representative, has sued the Employer and is not required by that section to give notice to the parties affected by the alleged unlawful business practice, does not establish that the lawsuit was filed with an illegal objective.

We also reject the Employer's claim that an illegal object is evinced by the fact that the Union's organizational efforts have failed to establish representative status, so it is using this lawsuit to foist itself upon the employees as their collective-bargaining representative. The Union's litigation efforts on behalf of unrepresented employees for the purpose of vindicating their rights under California law is not equivalent to representation for collective-bargaining purposes under Section 9(a). The Act regulates relationships between employers and unions as the exclusive collective-bargaining representatives of employees, but does not concern itself with the statutory protections California's wage and hour

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[14] Saunders v. Superior Court, 27 Cal.App.4th 832, 839 (Cal. App. 2d Dist. 1994).

[15] Prata v. Superior Court, 91 Cal.App.4th 1128, 1142 (Cal. App. 2d Dist. 2001)(emphasis added).

laws and regulations afford its citizens, including the Wal-Mart employees. Our research uncovered no support for the Employer's attempt to turn mere legal representation into collective-bargaining representation.[16] Accordingly, there is no basis for arguing that, even prior to its withdrawal from the lawsuit as a plaintiff, the Union subjected any employees to 9(a) representation without their consent by initiating the lawsuit on their behalf.[17]

Furthermore, even if such representation could be viewed as coercive of employee rights to refrain from participating in concerted activity, the Union is no longer a party to the proceeding and there is no evidence that it retains any control or influence over the litigation. There is also no evidence that any employees are opposed to the Union's effort to vindicate their rights under California law. Although the Union does not deny its overall interest in organizing Wal-Mart employees in California, and while its attorney has continued to represent the employee-plaintiffs, there is no evidence that the Union retains any control or influence over the litigation or the attorney's representation of the plaintiffs' interests.

Finally, even assuming the employees are not permitted to opt out of the litigation, and assuming further that the Union remains responsible for the litigation, the mere fact that employees may derive a benefit from the Union's litigation if the Employer's alleged violations of state law are substantiated does not rise to the level of illegal coercion under the Act. The Board will find a union-conferred benefit violates 8(b)(1)(A) where it has a reasonable tendency to restrain and coerce employees by suggesting that the union would engage in discrimination towards employees based upon their exercise of their Section 7 rights.[18] For instance, union offers to waive initiation fees for employees who join prior to a Board election may violate Section 8(b)(1)(A).[19] In Gregg, the Board found

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[16] The Board's lengthy discussion of the protected nature of union litigation on behalf of unrepresented employees in Novotel New York, 321 NLRB at 629-634, did not address this contention.

[17] For this reason, we reject any contention that the potential inclusion of statutory supervisors in the plaintiff class runs afoul of the Act.

[18] See, e.g., Teamsters Local 420 (Gregg Industries), 274 NLRB 603 (1985).

[19] Gregg Industries, 274 NLRB at 604, citing NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973).

that the union's offers to waive initiation fees amounted to coercion because of the "suggestion of discrimination predicated on an employee's exercise of his Section 7 rights," and the threat of exacting higher fees later when maintenance of membership may be a condition of employment.[20] However, the Board has also held that the benefit of waiving initiation fees is not per se coercive unless it impedes the free choice of the employees.[21] The Union's lawsuit here seeks relief on behalf of all similarly situated current and former Wal-Mart employees in California. In contrast to Savair and its progeny, there have been no economic inducements, threats, or other conduct of a discriminatory nature that would tend to encourage employees to forfeit their Section 7 rights to refrain from engaging in concerted activity or force them to feel compelled to support the Union. Accordingly, the mere attempt to vindicate employees' California statutory rights in the lawsuit, without more, is not coercive of employee Section 7 rights.

2. The Union's lawsuit is not unlawful under Bill Johnson's/BE & K because there is no evidence of retaliatory motive.

We also conclude that there is no basis for enjoining this ongoing lawsuit under traditional Bill Johnson's[22] and BE & K[23] principles. While it is too early in the civil litigation to determine whether the state law allegations of the Union's lawsuit are reasonably based,[24] there is no

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[20] Id. at 605.

[21] See, e.g., NLRB v. S & S Product Engineering Services, Inc., 513 F.2d 1311, 1312-1313 (6th Cir. 1975) (across-the-board waiver of initiation fees to all unit employees hired until the union succeeded in negotiating a contract was not coercive of employee rights under Savair); Stone & Thomas, 221 NLRB 567, 568 (1975) (offer to waive initiation fees after election not coercive where not conditioned upon union support during election campaign).

[22] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

[23] BE & K Construction Co. v. NLRB, 536 U.S. 516, 527-528, 532 (2002).

[24] See Bill Johnson's Restaurants v. NLRB, 461 U.S. at 744-747 (Board may not decide "genuinely disputed material factual issues," or determine "genuine state-law legal questions," i.e., legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous").

evidence at all that the lawsuit seeking redress under California law was filed in retaliation against the exercise of rights guaranteed by the Act. Although the Employer claims that the Union initiated the lawsuit as another prong in its "attack" on Wal-Mart to organize its California employees, we reject any contention that organizational motivation protected under Section 7 of the Act may be equated with unlawful retaliatory motive. Having concluded above that the lawsuit does not have the unlawful object of depriving employees of their right to refrain from engaging in concerted activity, and in the absence of direct evidence that the Union is using the lawsuit to punish Wal-Mart or its employees for exercising rights protected by the Act, it is unnecessary to wait for the ultimate outcome of the lawsuit to assess whether the "lower" Bill Johnson's or "higher" BE & K retaliatory motive standard can be met.

For all these reasons, the Region should dismiss this Section 8(b)(1)(A) charge, absent withdrawal.

B.J.K.